REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1079 & 1080 of 2003

(From Original Conviction and Sentence in Criminal Case No. 664 of 2003 of the Chief Magistrate's Court at Kibera – Ms Mwangi, PM)

KERUBA OLE SUPEYO …….....……..…….. APPELLANT

VERSUS

REPUBLIC …….....……..…….RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1080 OF 2003

JACKSON NDILAI KIBUBUKI …….....…….……. APPELLANT

VERSUS

REPUBLIC …….....……..…….RESPONDENT

JUDGMENT

KERUBE OLE SUPEYO and ***JACKSON NDILAI KIBUBUKI*** hereinafter referred to as the 1st and 2nd appellants respectively were charged alongside ***GEORGE KIMINGI KIOI*** with one count of robbery with violence contrary to section 296(2) of the Penal Code. The 2nd appellant alone faced two alternative counts of handling suspected stolen property contrary to Section 322(2) of the Penal Code. The appellants also jointly faced a second count of defilement of a girl contrary to section 145(1) of the penal code. Finally the appellants faced alternative counts of indecent assault contrary to section 144(1) of the

Penal Code.

Following a lengthy trial, the appellants' co-accused was acquitted of all the charges. On the other hand the appellants were convicted on the main count of robbery with violence but were acquitted of the other charges save for the 2nd appellant who was convicted on the alternative count of Handling Stolen goods contrary to section 322(2) of the penal code (count 3).

Upon conviction, the learned trial Magistrate sentenced both appellants to death as required by law. The appellants were aggrieved by the conviction and sentence and therefore lodged separate appeals to this court. At the hearing of the said appeals, we ordered their consolidation for ease of hearing and as they arose from the same criminal case in the court below.

The brief facts of the case were that on 26th January, 2002 at about 8.30 p.m., PW1, the complainant was in his house at Ngong-Mirico with his wife and child (PW2). In the compound there were two mechanics repairing his wife's car in the company of his worker. At about 9.30 p.m. PW1 went out to check on the three – once out PW1 asked whether the mechanics had finished with the repairs. The response he got was that he should not shout or he will be shot. That response was not from the mechanics or his workers but from strangers who had gained entry in to the compound. They were armed with a gun, a panga a bow and arrows.

According to PW1, it was the 2nd appellant who had a rungu and panga whereas the 1st appellant had a gun. The three then ordered PW1 back into the house. Whilst in the house the 1st appellant demanded from PW1 Kshs.3, 000,000/= failing which they would kill him. He was given a total of 580 US Dollars. When PW1's daughter intervened on behalf of her father she was ordered to keep quiet and was beaten by the 2nd appellant. The 2nd appellant ordered PW1's wife to their bedroom to look for more money from the safe – leaving behind the 1st appellant guarding PW1. For almost two hours, the robbers ransacked PW1's house and kept threatening him with death unless he gave them more money. They thereafter took various items. Later on the 2nd appellant took PW1 outside the house and led him to where the mechanics and his employee had been locked up by them. PW1 was then brought back into the house only to find that his daughter and wife were all in the daughter's bedroom. PW1 was then locked in his bedroom whereas his daughter (PW2) was separately locked in the baby's bedroom. At about midnight, PW1 contacted PW2 to find out what could have happened. PW2 confided him that she had been raped by one of the robbers. PW1 then contacted Ngong police station and reported the incident and thereafter took PW2 to Nairobi Hospital where she was admitted for 4 days undergoing treatment.

PW1 was able to identify the appellants because the lights were on during the incident. In fact according to PW1 he had 8 floodlights which were all on. He even gave the police the description of the robbers and also the items stolen.

Sometime in or about 12th January, 2003 at about 9.30 p.m., PW1 approached PW5 a police officer and indeed the investigating officer herein and informed him that he had earlier on seen one of the people who had robbed him on 27th November, 2002 and had trailed him to his residence at quarry stones. He wanted his assistance so that the culprit could be arrested. He subsequently led PW5 and other police officers to the residence of the appellant's co-accused and was arrested. From the information obtained from the co-accused upon interrogation the appellant's were arrested. From the 2nd appellant's house a charger allegedly belonging to PW1 and which was stolen during the robbery was recovered. The appellants were later on subjected to an identification parade. The 1st appellant was duly identified by PW3. The 2nd appellant was identified by one Robert Muthiga who was however not called as a witness.

Put on their defence, the 1st appellant elected to keep quiet whereas the 2nd appellant gave a sworn statement. In his defence, the 2nd appellant stated that on 13th January, 2003 he worked upto 3.00 p.m. at Dagoretti whereupon he proceeded to Ongata Rongai to relay a message to his brother that his child was sick. He stayed overnight. Between 12 and 1.00 a.m. he heard a car stop outside the house. He opened the door and was confronted by two police officers who demanded from him some money. When

responded that he had no money, he was beaten unconscious. When he came round he found himself in police cells. The following day he was removed from the cells by PW5 and interrogated over the data collector as well as the mobile chargers found in his house. With regard to the data collector, the appellant stated that he got it for purposes of repair form one Kinuthia. As for the chargers he claimed that they were his. He was subsequently charged for offences he knew nothing about.

In their grounds of appeal, the appellants fault their conviction on the evidence of identification, that the prosecution case was riddled with contradictions and that their defences were not adequately considered by the trial Magistrate. In support of the aforesaid grounds of appeal, the appellants tendered written submissions that we have carefully read and considered.

Mrs. Gakobo, learned state counsel, opposed the appeals. Counsel submitted that the evidence of PW2 and PW3 showed that they were able to identify the appellants at the scene of crime as it was well lit. Counsel further pointed out that PW1 had stated in evidence that there were 8 flood lights all of which were on. In those circumstances counsel pointed out, the scene was bright enough for positive identification. Counsel further submitted that the robbers remained with PW1, PW2 and PW3 for at least two hours. This period according to counsel was sufficient for witnesses to see the appellants. That PW1 described the role played by each appellant during the robbery. On identification parade, counsel submitted that Pw3 attended the identification parade conducted by PW4 and was able to identify both appellants. The identification of the appellant according to counsel could not in the circumstances be said to have been mistaken. On the insufficient of evidence, counsel submitted that the evidence adduced was sufficient to prove the charge. Counsel submitted that there were more than one robber and were armed with offensive weapons. Consequently the said evidence was sufficient to sustain the charge. On contradictions counsel pointed out that there were no such contradictions and if anything, the prosecution evidence was consistent and corroborated. On defences not being considered sufficiently by the trial magistrate, counsel submitted that the trial Magistrate considered the defences before dismissing them. Counsel therefore urged us to find that the conviction of the appellants was safe and dismiss the appeal.

In a brief reply the 2nd appellant pointed out that no identification parade was conduced with regard to him.

We are the first appellate court in this matter. Consequently it is out duty and indeed the appellants are entitled to expect from us that the evidence tendered in the trial court as a whole will be subjected to a fresh and exhaustive examination – ***SEE OKENO VS REPUBLIC (1972) E.A. 32.*** It is for this reason that we have endeavoured to summarize the salient portions of the prosecution case and the appellants' reaction to the same.

It is common ground that the offence was committed at night, at 9.30 p.m. to be precise. Consequently how, by what means and under what circumstances were the witnesses were able to identify the robbers becomes a critical issue. On this issue, the learned magistrate commented as follows:

"***Having gone through the evidence as adduced in this case in total I do take that PW1, PW2 and PW3 did say that the place the robbery took place was very well lit by floodlights. The accused persons never put off the light or disguised themselves. PW1 narrated what each of the accused did during the robbery……***

We are in agreement with this analysis of the evidence of identification. It is not lost on us that the robbery took more than 2 hours. All these time the robbers were in the company of their victims. The lights were on throughout the incident. They even engaged in discussions with PW1. Indeed PW1 testified under cross examination by the 2nd appellant

….. the premises is very well lit. I saw you very clearly…… I said you were 3 brown people and one had the ears cut out. You spoke to me for a long time. You were in my house for over two hours and there was light…….. "

As for the 1st appellant PW1 testified under cross examination by the 1st appellant

"…… *You were with me in full lights and you had not covered yourself so I saw you very well. You were with me over 2 hours. You had spat (sic) ears and have a scar on the face and you have a shorter one leg than the other. You were keeping on telling me to speak in Kiswahili and not English. You were speaking to me so I could observe you…."*

On the basis of the foregoing evidence we are satisfied that PW1 had ample opportunity and kept the robbers under observation for sufficient period of time to be able to positively identify them. It is not denied that there were lights inside and outside the house. Much as no inquiries were made by either the prosecutor and or the court regarding the nature and the source of the light as well as its source in relation to the robbers, we are nonetheless satisfied as per the recorded evidence that the house was well lit and so did by flood lights considering the long period PW1 spent with the robbers who did not even bother to disguise themselves, PW1 was accorded ample opportunity to observe them. Although it would have been desirable for PW1 to attend identification parade so as to identify the appellant, his failure to do so (he was out of the country) did not in any way weaken his identification of the appellants at the scene of crime.

PW2 also identified the appellants at the scene of crime. Regarding the 2nd appellant, PW2 testified:

"…***.. The lights were on. I saw you more clearly than others…..I am sure its you I saw clearly……..I took down in my mind your physic…. That was a unique occurrence so I cannot forget you….. I saw you when you brought my mother and then took her to the room…… If you saw a person in such circumstances you will not forget him. There is no way I can ever fail to identify you….."***

With regard to the 1st appellant this witness identified him when he came from outside. We note that PW2 was cross examined extensively on the question of identification but remained unshaken. She also took the view that the appellants were in the house for well over 2 hours which enabled her to observe them and be in a position to subsequently identify them.

Similarly this witness did not attend an identification parade as she was away in school. However we are satisfied that the identification of the appellants at the scene of crime by this witness cannot be faulted.

Finally PW3 also testified as to the identification of the appellants. According to this witness, he was able to identify the appellants as they approached him where he was repairing PW1's wife's motor vehicle. According to PW3

"…***.. The place we were in was very lit by flood lights***….***"***

Under cross-examination by the 2nd appellant, the witness was adamant that

"…… ***There was enough light you could not fail to identify him again……"***

As for the 1st appellant the witness testified as follows

"***I cannot tell how many Maasai's were there. You had split ears. I saw you face to face. I cannot forget you……."***

On the basis of the foregoing we are satisfied as indeed was the trial court that there was sufficient light at the scene of crime and that this witness had opportunity to observe the appellants sufficiently to be able to identify them subsequently. This witness was further able to identify the 1st appellant at an identification parade conducted by PW4. although the 1st appellant contends that the said parade was not properly conducted in that he was not told in advance regarding the identification parade so that he could contact his lawyer and or any member of his family to be present. Regarding the parade the appellant further complains that it was irregular for the parade officer to have been the one to call witnesses to the identification parade.

We have carefully considered these complaints and have come to the conclusion that they are without merit. Having perused the parade forms that were produced as exhibits during the trial we are satisfied that the appellant was informed of his right to have a lawyer present during the identification parade. As for calling witnesses to identification parade, by the parade officer we do not discern anything irregular about it.

Having carefully evaluated the evidence in this regard we are persuaded that the issue of identification was fully appreciated and carefully considered by the trial court in order to rule out the possibility of mistake or error. We are of course aware of the court of appeal decision in ***ANJONONI & OTHERS vs. REPUBLIC (1980) KLR 59*** wherein it was stated

"…… ***The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in the possession of the accused.***

We think however that sufficient opportunity was afforded to the 3 witnesses to identify the appellant by the light in the house as well as the flood lights outside the house. The appellants also were with these witnesses for a considerable period of time.

The 2nd appellant was also found with a mobile charger which PW1 positively identified as his and which was among the items stolen during the robbery. On this particular charger PW1 had inscribed thereon "A" for Allan. PW1 also produced a receipt for the said charger. The 2nd appellant did not dispute the fact that the charger was recovered from his house. In fact he claimed ownership of the same. However, he was unable to produce any evidence documentary or otherwise to prove his ownership of the said mobile charger. He was also unable to explain the inscription "A" on the said mobile charger. In our view PW1 was able to sufficiently prove that the charger belonged to him. It is instructive that the charger was recovered from the 2nd appellant hardly a month after PW1 had been robbed.

The 2nd appellant was in our judgment therefore in recent possession of the charger. He did not give an explanation to account for his possession other than to claim that it was his yet the evidence indicates otherwise. In the circumstances, there is a presumption that he was among the people who robbed the complainant. See ***ANDREA OBONYO VS. REPUBLIC (1962) E.A. 542.*** This evidence was strong and proved the guilt of the 2nd appellant.

On contradictions, the appellant points out contradiction as to who had the torch, who raped PW2, who kept guard over the people etc. To our mind these contradictions are minor and do not go to the root of the prosecution case. According to the appellants, the contradictions referred to hereinabove could only mean one thing, that case was a frame up. We are unable to agree with that line of argument. PW1, PW2 and PW3 did not know the appellants before then and had no scores to settle. Further what benefit would the said witnesses gain from framing up the appellants with these charges? In our view none whatsoever.

Finally with regard to the defences, we note that the 1st appellant when called upon to offer his defence, elected to keep quite. In those circumstances, there was no defence which the 1st appellant would have accused the trial Magistrate for not taking into account. As for the 2nd appellant, although he gave a sworn statement of defence, the same was duly considered by the trial Magistrate and found to be unbelievable. The learned trial Magistrate considered the fact that the charger found in the house of the 2nd appellant had the initials of PW1 "A" and was positively identified by PW1 as his. It was for this reason that trial Magistrate rejected the 2nd appellant's defence and rightly so in our view.

For those reasons, we are satisfied that the appellants were properly convicted. The appeals have no merit whatsoever and are dismissed.

Dated at Nairobi this 25th day of May, 2006.

……..

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE